

## INCLUSION OF INDEMNITEE'S NEGLIGENCE IN INDEMNITY CONTRACT

*Metropolitan Paving Co., Inc. v. Gordon Herkenhoff & Associates*  
66 N.M. 41, 341 P.2d 460 (1959)

Certain property owners brought an action for damages against the City of Santa Fe and the Metropolitan Paving Company alleging the latter's negligence in the construction of a detour. The city filed a third party complaint against the engineering firm which had prepared the plans for the detour. In its motion for summary judgment the engineering firm argued that even though it might have been negligent in preparing the plans, it was exempt from liability because the paving company had agreed in its contract with the city to indemnify and save harmless the city and its engineer from all suits brought on account of the construction of the detour.<sup>1</sup> The district court granted summary judgment and the supreme court affirmed, holding that it was not necessary for the indemnity clause to expressly include suits arising from the indemnitee's own negligence for the indemnitee to be held harmless.

The object in the interpretation of indemnity clauses accepted in all jurisdictions is the determination of the intention of the parties.<sup>2</sup> The presumption in interpreting such clauses, however, is against the intention to include the indemnitee's own negligence.<sup>3</sup>

Some courts interpret indemnity provisions of a very general and all-inclusive nature as including the indemnitee's own negligence, basing their interpretation solely on the sweeping scope of the language used in the provision.<sup>4</sup> This view is followed in the principal case. Courts following this approach reason that while intent to include the indemnitee's own negligence must be clear, it need not be express;<sup>5</sup> and the presumption against

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<sup>1</sup> "The contractor hereby expressly binds himself to indemnify and save harmless the city and its engineer from all suits and actions of every nature and description brought against the city or any person or persons on account of the construction of this work or by reason of any act or omission, misfeasance, malfeasance of the contractor or his agents, subcontractors or employees."

<sup>2</sup> *First Trust Co. v. Aredale Ranch and Cattle Co.*, 136 Neb. 521, 286 N.W. 766 (1939); 27 Am. Jur. "Indemnity" § 13 (1940); 42 C.J.S. "Indemnity" § 8 (1944).

<sup>3</sup> *Mitchell v. Southern Ry.*, 124 Ky. 146, 74 S.W. 216 (1903); *Mynard v. Syracuse, B. & N.Y.R.R.*, 71 N.Y. 180, 27 Am. Rep. 28 (Ct. App. 1877); *Perkins v. New York C.R.R.*, 24 N.Y. 196, 82 Am. Dec. 282 (Ct. App. 1862).

<sup>4</sup> *National Transit Co. v. Davis*, 6 F.2d 729 (3rd Cir. 1925); *Fosson v. Ashland Oil and Refining Co.*, 309 S.W.2d 176 (Ky. Ct. App. 1957); *Long Island R.R. v. American Bridge Co.*, 175 App. Div. 170, 161 N.Y. Supp. 543, *aff'd*, 225 N.Y. 692, 122 N.E. 886 (1919); *Cavanaugh v. C. P. Boland Co.*, 149 Misc. 576, 268 N.Y. Supp. 390 (Sup. Ct. 1933); *Standard Accident Ins. Co. v. Nat'l Fire Proofing Co.*, 39 Ohio App. 1, 176 N.E. 591 (1931); *Griffiths v. Henry Broderick, Inc.*, 27 Wash. 2d 901, 182 P.2d 18 (1947).

<sup>5</sup> *Buckeye Cotton Oil Co. v. Louisville and N.R.R.*, 24 F.2d 347 (6th Cir. 1928);

such intent, being a rule of construction, cannot apply where there is no ambiguity in the clause,<sup>6</sup> as, they feel, is the case with a general and all-inclusive provision.

Other courts require express and explicit reference to the indemnitee's negligence.<sup>7</sup> These courts read into all-inclusive language an intent to *exclude* injuries caused by the sole negligence of the indemnitee.<sup>8</sup> They reason that, in the absence of express reference, the parties did not intend to impose a liability on the indemnitor the control of which would be entirely in the hands of the indemnitee.<sup>9</sup>

The majority of courts seem to take a position between these two extremes, requiring something less than express reference to the indemnitee's negligence where the *intent* to include such negligence is not precluded by language used in the contract, and such intent becomes evident upon a consideration of the circumstances surrounding the parties<sup>10</sup> and the object which induced the making of the contract.<sup>11</sup>

Regardless of the rule of interpretation used, the great majority of cases have resulted in findings that the parties did not intend to include the indemnitee's own negligence in the indemnity provision.<sup>12</sup>

A reading of the Ohio cases fails to reveal a firm rule. There are, for example, Ohio cases which follow the majority rule of interpretation,<sup>13</sup> others

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Payne v. National Transit Co., 300 Fed. 411 (W.D. Pa. 1921); 42 C.J.S. "Indemnity" § 5 (1944).

<sup>6</sup> Fosson v. Ashland Oil and Refining Co., *supra* note 4; Bay State Street Ry. v. North Shore News Co., 224 Mass. 323, 112 N.E. 1007 (1916); Northern Pac. Ry. v. Thornton Bros. Co., 206 Minn. 193, 288 N.W. 226 (1939).

<sup>7</sup> Sinclair Prairie Oil Co. v. Thornley, 127 F.2d 128 (10th Cir. 1942); Fisk Tire Co. v. Hood Coach Lines, 54 Ga. App. 401, 188 S.E. 57 (1936); Buford v. Sewerage and Water Bd. of New Orleans, 175 So. 110 (La. Ct. App. 1937); Massachusetts Bonding & Ins. Co. v. Westinghouse Elec. & Mfg. Co., 47 Ohio L. Abs. 344, 72 N.E.2d 388 (1946).

<sup>8</sup> Annot., 175 A.L.R. 32 (1948).

<sup>9</sup> Perry v. Payne, 217 Pa. 252, 66 Atl. 553 (1907).

<sup>10</sup> "Circumstances surrounding the parties" refers to the facts and circumstances under which the contract was made.

<sup>11</sup> Rhinehart v. Southern Pac. Co., 38 F. Supp. 76 (S.D. Cal. 1941); Southern Pac. Co. v. Fellows, 22 Cal. App. 2d 87, 71 P.2d 75 (1937); Terminal R. Ass'n v. Ralston-Purina Co., 352 Mo. 1013, 180 S.W.2d 693 (1944); Stern v. Larocca, 49 N.J. Super. 496, 140 A.2d 403 (1958).

<sup>12</sup> Annot., 175 A.L.R. 30 (1948).

<sup>13</sup> City of Cleveland v. Baltimore & O.R.R., 71 F.2d 89 (6th Cir. 1934). ("To indemnify and save the railroad free and harmless from any and all damages to person or persons . . . or property by reason of or in any way connected with the erection, construction, maintenance, alteration and/or repair of said sewer . . ." Court held above provision included injury to city employee caused by railroad's negligence during construction of sewer across railroad's right of way in accordance with easement granted by railroad.)

Baltimore and O.R.R. v. Youngstown Boiler & Tank Co., 64 F.2d 638 (6th Cir. 1933) ("Save harmless from payment of all money by reason of all or any such accidents, injuries, damages or hurt that may happen or occur upon or about such work . . . while it is in progress." When employee of contractor-indemnitor was injured

that follow the "express reference" rule,<sup>14</sup> and even some that were decided solely on the basis of the all-inclusive language used in the provision.<sup>15</sup>

The better rule for interpretation of indemnity clauses appears to be the one which excludes coverage for the indemnitee's own negligence in the absence of express provision for its inclusion. The law in this area lacks certainty and uniformity, as exemplified by the Ohio decisions, and gives rise to much unnecessary litigation and unfairness which could be eliminated should the "express reference" rule be adopted in all jurisdictions.

Any theory under which the indemnitee's own negligence is included in an indemnity clause is inconsistent with the basic purpose behind such clauses. This purpose is to protect the employer from vicarious liability for the contractor's torts, not to make the contractor the insurer of his employer.

If this basic purpose is disregarded, a single negligent act by the employer or his employees, over whom the contractor has no control, could shackle the contractor with a disastrous and extraordinary liability. Therefore, unless there is express reference to such negligence, clearly showing an intentional assumption of this additional liability, it would seem unwise for the court to impose it on the contractor by construction.<sup>16</sup>

Even though the application of the "express reference" rule may appear harsh or arbitrary in some instances, this disadvantage would be offset by the certainty that such a rule would bring into this segment of the law.<sup>17</sup>

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during performance of building contract by escaping electricity from nearby high tension wire, court ruled injury covered by above clause.)

<sup>14</sup> *Massachusetts Bonding & Ins. Co. v. Westinghouse Elec. & Mfg. Co.*, *supra* note 7. ("The contractor shall be responsible for all accidents and damages to persons or property directly or indirectly due to erection of such equipment. . . ." Negligence of employer-indemnitee caused injury to employee of indemnitor-company, during installation of electrical equipment and court held such negligence to be within scope of clause.)

<sup>15</sup> *J. V. Nicholas Transfer Co. v. Pennsylvania R.R. Co.*, 154 F.2d 265 (6th Cir. 1946) ("To save harmless and indemnify Railroad from and against all fines, penalties, loss, damage, cost and expense suffered or sustained by Railroad or for which Railroad may be held or become liable by reason of injury to persons or property, or other causes whatsoever, in connection with . . . business or operations . . . ." Truck driver, an employee of indemnitor-cartage company, was injured by negligence of railroad-indemnitee and court ruled indemnity provision included such negligence.)

*St. Paul Mercury Indemnity Co. v. Kopp*, 70 Ohio L. Abs. 259, 121 N.E.2d 23 (1954). ("Contractor agrees . . . to indemnify and save harmless Principal from any and all loss, cost, damage, or expense to persons or property, including the injury or death suffered by persons employed by said contractor or members of the public growing out of or in any way connected with the performance of the work awarded to contractor." Court ruled negligence of indemnitee-employer in causing death of employee of contractor by the high voltage of a power line, was included in the coverage of the provision.)

<sup>16</sup> *Perry v. Payne*, *supra* note 9.

<sup>17</sup> An article which gives comprehensive treatment to the problems in this area is found in Annot., 175 A.L.R. 32 (1948); See also Snow, "Indemnity Agreements," 25 Ins. Counsel J. 326 (1958).